TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]168 [redacted]10

JOSEPH W. NICHOLAS, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 18, 1918.

(26,650)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1915.

No. 564.

(26,850)

(26,650)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 564.

JOSEPH W. NICHOLAS, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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DD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 10, 1919.

I. *Original Petition.*

Filed May 23, 1916.

In the Court of Claims.

No. 33263.

JOSEPH W. NICHOLAS

vs.

THE UNITED STATES.

Petition.

To the Chief Justice and Judges of the Court of Claims:

The claimant respectfully represents and shows:

I. Claimant is a citizen of the United States and a resident of the State of Maryland.

II. Claimant was appointed to the office of Inspector of Customs, in and for the Port of Baltimore, Maryland, on August 30th, 1900. After taking the oath of office for said office on said date, claimant was paid the compensation of Four ($4.00) dollars per diem for every day in the year. This appointment was made by the Secretary of the Treasury upon the nomination of the Collector of the Port of Baltimore.

III. Claimant continued under said appointment in said port at said compensation, to and including the 20th day of February, 1913. During the period between August 30th, 1900, and February 20th, 1913, both dates inclusive, claimant received the full compensation of Four ($4.00) dollars per diem for every day in the year. On said date of February 20th, 1913, claimant was summarily discharged from the service of the United States by the Collector of the Port of Baltimore, who acted pursuant to instructions issued by the Secretary of the Treasury. No charges of any nature whatsoever were preferred against claimant, and no reasons were given to claimant for his removal.

IV. Claimant avers that his summary removal from the service of the United States, as aforesaid, was unlawful, invalid and of no force and effect, because it was contrary to Section VI. of the Act of Congress, approved August 24, 1912 (37 Stat. 555).

V. On the said 20th day of February, 1913, when claimant was informed that his services had been terminated, he demanded to know the reasons therefor from his immediate superior. Claimant was advised by said superior that he did not know the reasons for his removal, except that it had been recommended by an investigating committee of special agents.

VI. Claimant was, by virtue of his appointment, an employee of the Civil Service of the United States, under the Act of Congress, January 16, 1883, known as the Civil Service Law.

3 VII. During all the time from the date of claimant's removal on February 20th, 1913, as heretofore alleged, claimant has stood ready, willing and able to perform the duties of the office to which he was legally appointed, and from which he was illegally separated. Claimant avers that he has been prevented from performing the duties of said office by direction of the Secretary of the Treasury or his subordinates.

VIII. Claimant avers that he was, and is entitled to the compensation of Four ($4.00) dollars per diem for each and every day from the 20th day of February, 1913, to and including the 20th day of May, 1916, eleven hundred eighty-five (1,185) days, amounting to Forty-seven Hundred Forty ($4,740.) dollars.

IX. Claimant is the sole owner of this claim, no other person or corporation is interested therein, and no assignment or transfer of the claim, or any part thereof, or interest therein, has been made.

X. Claimant is justly entitled to the amount herein named from the United States, as he is advised and believes, after allowing all just credits and set-offs.

Wherefore, he prays judgment against the United States for the sum of Forty-seven Hundred Forty ($4,740.) dollars.

SPOOR & RUSSELL,
Attorneys of Record.

DUDLEY & MICHENER,
Of Counsel.

4 STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me, a notary public in and for the County of New York, William E. Russell, who being sworn according to law, deposes and says: That he is a member of the partnership of Spoor & Russell, which partnership has been duly authorized by power of attorney, to represent the claimant and verify pleadings in this case; that he has read and understands the foregoing petition, and that the matters and things therein stated are true in substance and in fact, as he is informed and believes.

WILLIAM E. RUSSELL.

Subscribed and sworn to before me this 22nd day of May, 1916.

[SEAL.] E. E. LEVINE,
Notary Public, Kings Co.

Cert. filed N. Y. Co. County Clerks' Nos. Kings Co. 77; N. Y. Co. 230. Registers' Nos. Kings Co. 8081; N. Y. Co. 8200.
Commission expires March 30, 1918.

II. *Claimant's Amendment to Petition.*

Filed, by Leave of Court, October 17, 1918.

To the Chief Justice and Judges of the Court of Claims:

The claimant respectfully amends the petition as follows:

Amended Paragraph VIII.

Claimant avers that he was and is entitled to the compensation of Four ($4) Dollars per diem for each and every day from the 20th day of February, 1913, to the day of rendering judgment in this case, the amount due to, and including the 30th day of September, 1917, being Six thousand seven hundred thirty-two ($6,732) Dollars.

Amended Conclusion of Law.

Wherefore, claimant prays judgment against the United
6 States for the sum of Six thousand seven hundred thirty-two ($6,732) Dollars, the amount due at this time, and for such additional amount as may be due at the date of rendering judgment herein.

SPOOR & RUSSELL,
Attorneys of Record.

DUDLEY & MICHENER,
Of Counsel.

STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me, a notary public in and for the County of New York, William E. Russell, who being sworn according to law deposes and says that he is a member of the firm of Spoor & Russell, a partnership, which partnership has been duly authorized by power of attorney to represent the claimant and verify pleadings in this case; that he has read and understands the foregoing amendments of petition, and that the matters and things therein stated are true in substance and in fact, as he is informed and believes.

WILLIAM E. RUSSELL.

Subscribed and sworn to before me this 2nd day of October, 1917.
[SEAL.] GEORGE E. BROWN,
Notary Public, Richmond County.

Certificate filed in New York County No. 321. New York Register No. 9289.
Term expires March 30, 1919.

7 III. *General Traverse.*

Court of Claims.

No. 33263.

JOSEPH W. NICHOLAS
vs.
THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

IV. *Argument and Submission of Case.*

On March 6, 1918, this case was argued and submitted on merits by Mr. W. E. Russell, for the claimant, and Mr. Harvey D. Jacob, for the defendants.

8 V. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Hay, J., in which Downey, J., Barney, J., Booth, J., and Campbell, Ch. J., Concur.*

Entered May 13, 1918.

This case having been heard by the Court of Claims the court, upon the evidence makes the following

Findings of Fact.

I.

The plaintiff, Joseph W. Nicholas, is a citizen of the United States and a resident of the State of Maryland and was duly appointed an inspector of customs in the port of Baltimore on January 28, 1902, at a compensation of $4 per diem for every day in the year. He continued under the aforesaid appointment to and including February 20, 1913. On that day he was summarily discharged from the service of the United States by the collector of customs of the port of Baltimore pursuant to instructions issued by the Secretary of the Treasury.

At the time of his discharge from said service he was in the classified civil service of the United States. Before and at the time of his discharge aforesaid charges had been preferred against him by a committee appointed by the Secretary of the Treasury to examine into and report upon the conduct of the customs business at Baltimore. The said Joseph W. Nicholas had no notice of these charges and was not furnished with a copy thereof, nor was he allowed a reasonable time for personally answering the same in writing.

II.

There has been no evidence taken in this case to show either the willingness or the ability of the plaintiff to perform the duties of his office as inspector of customs from the date of his removal from the service on February 20, 1913. It does not appear that he made any report in person or in writing to the office of the collector of customs at Baltimore.

The plaintiff is the sole owner of this claim, and no assignment or transfer of the claim, or any part thereof or interest therein, has been made.

9 Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition herein should be, and the same is hereby, dismissed. Judgment is rendered in favor of the United States against the plaintiff for the cost of printing the record in this cause in the sum of nine dollars and ninety-eight cents ($9.98).

Opinion.

HAY, Judge, delivered the opinion of the court:

Both the plaintiff and defendants have discussed in their briefs the question of the legality of the removal from office of the plaintiff and the effect and meaning of section 6 of the act of August 24, 1912. We do not deem it necessary to pass upon those questions in view of the fact that the plaintiff has failed to show affirmatively his willingness and ability to discharge the duties of the office in question from the date of his removal therefrom down to the present time. If it should be held that the plaintiff was illegally removed from the office which he held, still in order that he may recover the salary which is alleged to be due him from the time of his alleged illegal removal therefrom to the present time it must appear affirmatively in the record that he was willing and able to discharge the duties of the office. There is no evidence in this record that such was the case. Indeed, there is no evidence of any kind of such willingness or ability. United States v. Wickersham, 201 U. S., 390, 399. Perkins v. United States, 20 Ct. Cls., 438, 441. Miller v. United States, 45 C. Cls., 509, 517.

The petition will therefore be dismissed, and it is so ordered.

Downey, Judge; Barney, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

10 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Thirteenth day of May, A. D. 1918, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that Joseph W. Nicholas, as aforesaid, is not entitled to recover and shall not recover any sum in this action of and from the defendants, the United

States; and that the petition be and it hereby is dismissed: And it is further ordered, adjudged, and decreed that the defendants, the United States, as aforesaid, shall have and recover of and from the claimant, Joseph W. Nicholas, as aforesaid, the sum of Nine dollars and ninety-eight cents ($9.98) the cost of printing the record in said cause in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VII. *Proceedings Had After Entry of Judgment.*

On June 11, 1918, the claimant filed a motion for new trial and to remand the case to the general docket for the taking of testimony. On June 17, 1918, this motion was overruled by the court.

VIII. *Claimant's Application for and Allowance of an Appeal.*

Comes now the claimant and makes application for an appeal to the Supreme Court of the United States.

SPOOR & RUSSELL,
Attys. of Record.

DUDLEY & MICHENER, *Counsel.*

Filed July 12, 1918.

Ordered: That the above appeal be allowed as prayed for.
July 16, 1918. EDWARD K. CAMPBELL,
Chief Justice.

11 Court of Claims.

No. 33263.

JOSEPH W. NICHOLAS
vs.
THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court by Hay, J.; of the judgment of the court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 16th day of July, A. D. 1918.

[Seal Court of Claims.]

SAML. A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26650. Court of Claims. Term No 564. Joseph W. Nicholas, appellant, vs. The United States. Filed July 18th, 1918. File No. 26650.

* * * * * * *

IV. *History of Proceedings.*

On March 6, 1918, the case was argued and submitted on merits by Mr. W. E. Russell, for the claimant, and Mr. Harvey D. Jacob, for the defendants.

On May 13, 1918, the court filed findings of fact, conclusion of law, and opinion by Hay, J., in which Downey, J., Barney, J., Booth, J., and Campbell, Ch. J., concurred, and entered a judgment against the claimant in the sum of $9.98 for the cost of printing the record.

On June 11, 1918, the claimant filed a motion for new trial and to remand the case to the general docket for the taking of testimony. On June 17, 1918, this motion was overruled by the court.

On July 12, 1918, the claimant filed an application for an appeal to the Supreme Court which application was allowed July 16, 1918.

Said record was filed in the Supreme Court July 18, 1918, and Docketed as 26,650, October Term, 1918, No. 564. (No. 168, October Term, 1919.)

V. *Order of Supreme Court on Motion to Remand to Court of Claims.*

Filed October 20, 1920.

On consideration of the motion to remand this cause to the Court of Claims for further findings of fact,

It is now here ordered by the court that the said motion be, and the same is hereby, granted, and the Court of Claims is directed to set aside its judgment and reopen the case for further testimony and to make additional findings of fact.

October 13, 1919.

VI. *Order of Court of Claims on Above Mandate.*

Entered October 27, 1919.

In obedience to the mandate of the Supreme Court in this cause it is ordered that the judgment heretofore rendered by this court be and the same is hereby set aside, and the cause is remanded to the General Docket with leave to both parties to take additional proof in accordance with the mandate of the Supreme Court.

BY THE COURT.

VII. *Argument and Submission of Case.*

On February 24, 1920, this case was argued on the order of remand of the Supreme Court by Mr. Louis T. Michener, for the claimant, and by Mr. Harvey D. Jacob, for the defendants, and submitted.

VIII. *History of Further Proceedings.*

On March 8, 1920, the court filed findings of fact and conclusion of law, and opinion, and entered judgment against claimant for printing and dismissed the petition.

On March 18, 1920, the claimant filed a motion to amend the findings.

On March 22, 1920, the court filed an order allowing in part and overruling in part claimant's motion to amend findings and filed amended finding V, and ordered that former judgment and opinion stand.

Said findings (as amended), conclusion of law and opinion are as follows:

IX. *Findings of Fact (as Amended), Conclusion of Law, Opinion of the Court by Hay, J., in which All the Judges Concur.*

Entered March 8, 1920.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff, Joseph W. Nicholas, is a citizen of the United States and a resident of the State of Maryland, and was duly appointed an inspector of customs in the port of Baltimore on January 28, 1902, at a compensation of $4 per diem for every day in the year.

II.

During the year 1911 the Secretary of the Treasury appointed a committee to examine into and report upon the conduct of the customs service at Baltimore. On August 24, 1911, the committee reported in part as follows: "J. W. Nicholas: This officer entered the customs service in 1899 as inspector. He has been suspended for drinking; is rated No. 2 by the surveyor for 'not giving proper supervision over his work,' and by Chief Inspector Hamlet this officer is charged with being at times indifferent, and again is excellent, and was suspended for intoxication. In view of this record and of personal observation we are of opinion that the service would be benefited by his removal and the place filled by a person competent to discharge all the duties of the position."

On February 5, 1913, the Secretary of the Treasury, Hon. Franklin MacVeigh, the appointing authority, approved the recommendation of the committee, and on February 19, 1913, wrote the collector of customs at Baltimore to remove the plaintiff from the service for the following reasons given in writing, namely, "on account of the

use of intoxicating liquors and the unsatisfactory and perfunctory manner in which he performs his work. The plaintiff was therefore on February 20, 1913, removed from the service. At the time of his dismissal from said service he was in the classified civil service of the United States. The plaintiff at the time of his dismissal from the service had no notice of any charges given him; nor was he given opportunity to reply to the same.

III.

Before the plaintiff was dismissed from the service Congress passed an act, to wit, the act of August 24, 1912, authorizing the President of the United States to reorganize the customs service of the United States, and providing further that the organization effected thereunder should be permanent until otherwise provided by Congress. This permanent organization was reported to Congress on March 3, 1913. Under this reorganization of the customs service there were provided for the district of Maryland (including the State of Maryland, the District of Columbia, and the county of Alexandria, Va.) 33 inspectors of customs. These offices are now filled and have been filled since March 3, 1913, by persons appointed by the Secretary of the Treasury.

IV.

The plaintiff made no appeal to the Secretary of the Treasury at the time of his removal from office, nor has he at any time since his removal made such an appeal.

V.

The plaintiff was willing and physically able to resume the duties of his office and capable of discharging the same. He did not apply for reinstatement therein at any time or notify the Secretary of the Treasury of his desire therefor or for a revocation of the order of dismissal.

VI.

If the plaintiff is entitled to recover he is entitled to receive $4 per diem for each and every day from February 20, 1913, to and including the 8th day of March, 1920, which per diem amounts to the sum of $10,332.

Conclusion of Law.

Upon the foregoing findings of fact, the court decides as a conclusion of law, that the plaintiff is not entitled to recover. It is therefore adjudged and ordered that the petition of the plaintiff be, and the same is hereby dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him in the manner prescribed by law.

Opinion.

HAY, *Judge*, delivered the opinion of the court:

The plaintiff was an inspector of customs at the port of Baltimore, receiving $4.00 per diem. During the year 1911 the Secretary of the Treasury appointed a committee to examine into and report upon the conduct of the customs service at the port of Baltimore. On August 24, 1911, that committee reported to the Secretary, among other things, that the plaintiff should be dismissed from the service, whereupon the Secretary of the Treasury on February 19, 1913, directed in writing the collector of customs at Baltimore to remove the plaintiff from the service "on account of the use of intoxicating liquors and the unsatisfactory and perfunctory manner in which he performs his work." In pursuance of this order the plaintiff was removed from the service on February 20, 1913. At the time of the plaintiff's removal from the service he was in the classified civil service of the United States, and received no notice of the charges upon which he was removed, nor was he given an opportunity to reply to the charges. Since the date of the plaintiff's removal he asserts that he has been ready, able, and willing to perform the duties of the office of inspector of customs; and if he is entitled to recover in this suit, the amount of salary from the date of his dismissal to the date of the judgment in this case is $10,332. The plaintiff made no appeal to the Secretary of the Treasury at the time of his removal from office, nor has he at any time since his removal made such appeal. Before the plaintiff was removed from the office Congress passed an act authorizing the President to reorganize the customs service of the United States and providing that the organization effected thereunder should be permanent until otherwise provided by Congress. 37 Stat. 434. This permanent organization was reported to Congress on March 3, 1913, and there were provided for the district of Maryland, in which the port of Baltimore is included, 33 inspectors of customs. These 33 offices were filled by appointment of the Secretary of the Treasury of persons who, or their successors, are now filling these offices, so that since the third day of March, 1913, there has been no office to which the plaintiff could have been appointed. The plaintiff filed his petition in this court on May 23, 1916, more than three years after he had been removed from the office, the salary of which he is now asking shall be paid him from the date of his removal down to this date, and, of course, if he is paid as he sets out he is entitled to be paid it will follow that he must be paid for the rest of his natural life.

The plaintiff asserts that he has been illegally dismissed from the office of inspector of customs; that he was, when dismissed, in the classified civil service of the United States; and that owing to his readiness, willingness, and ability to discharge the duties of the office he is entitled to its emoluments, notwithstanding the fact that he has rendered no service to the Government of the United States since

his removal from the office. He bases his claim upon the following provisions of the act approved August 24, 1912, 37 Stat., 555, sec. 6. "That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing, and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal; and the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for the reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same":

The provisions of the above statute do not deny the right of the Secretary of the Treasury to remove from office an officer whom he has appointed. The plaintiff was appointed to the office which he held by the Secretary of the Treasury whom Congress had clothed with the power to make such appointment. Having the power to appoint the Secretary of the Treasury had also, as incident to it, the power to remove. The provisions of the act above quoted give to the appointing power directions which must be followed when the removal of a person in the classified civil service of the United States is sought. A duty is imposed upon the officer, but if he ignores it and removes a person from office, his action does not thereby create an obligation upon the Government to pay a salary to a person so removed for an indefinite time. In other words, the Government is not responsible for the illegal orders of surbordinate officers. The Government can not be required by the action of its officers to pay salaries to persons for the rest of their natural lives who, since their removal from office, have done nothing to earn them.

If an illegal order dismissing a person from office is issued, the person so dismissed can not, without some action on his part, expect to continue to receive the compensation of the office. Some obligations rest upon him. It became his duty at once, or at least with reasonable diligence, to appeal to the officer having authority to revoke or to modify or to correct the illegal order. If he obeys the order and submits without appeal and without objection for an unreasonable time he must be held to have abandoned all title and claim to the office and its emoluments. Ide v. United States, 25 C. Cls., 401-407.

In this case the plaintiff was dismissed from the office which he held by the Secretary of the Treasury. Whether rightfully or wrongfully dismissed, he took no steps to have the order dismissing him revoked; he did not appeal to the Secretary of the Treasury. He did not request that the charges upon which he was removed should be communicated to him. He never has since his removal made any attempt to have the order of removal revoked, or to appeal to the Secretary of the Treasury, but has contented himself with

bringing a suit in this court to recover the salary of an office from which he has been dismissed, and the duties of which he has not performed. He did not take this step until more than three years had passed after his removal.

His remedy under the statute is perfectly obvious; he could have appealed to the Secretary of the Treasury to furnish him with the charges upon which the Secretary had acted and for a reasonable time to answer the same and to file affidavits supporting his answer, and then the Secretary could in his discretion have examined the witnesses, and have tried the case. If the Secretary did not choose to do this, the case would have been closed, and the order removing the plaintiff would have stood. The purpose of the statute was to give to persons in the classified civil service of the United States, before their removal therefrom, the right to see the charges upon which their removal was based, together with the privilege of answering the same in writing, and of having a trial if in the discretion of the appointing power he chose to grant one. The statute does not, and cannot, be held to contemplate that if the Secretary of the Treasury, as in this case, failed to carry out the provisions of the statute an obligation was thereby created against the Government to pay the salary of a person so removed after his removal and for an indefinite time thereafter.

This court can not try an action which has for its purpose the reinstatement of the plaintiff to the office from which he has been removed. And the fact remains that the plaintiff was dismissed from the office; that he is out of the service, and some other person was required to perform the duties of the office from which he has been dismissed. We are now asked to enter a judgment against the Government in favor of the plaintiff for the salary of an office from which he has been dismissed, and the duties of which he has not performed for seven years, when he has made no effort to have the order removing him revoked and has made no appeal to the Secretary of the Treasury to be reinstated. It must be held that he has submitted to the order of removal without appeal and without objection for an unreasonable length of time, that he has not used due diligence in asserting his rights, and that he has thereby abandoned all title and claim to the emoluments of the office. We, therefore, decide that the plaintiff, whether rightfully or wrongfully dismissed from the office, is not entitled after his dismissal and in the absence of any appeal or objection on his part within a reasonable length of time to recover some $10,000 salary, for seven years and more, of an office the duties of which he never performed during that period, and which were performed by some other person duly appointed to the office. Ide v. United States, supra. See U. S. ex rel. Arant vs. Lane, Secretary of Int., 249 U. S., 367.

Graham, Judge; Downey, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

X. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 8th day of March, A. D. 1920, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants and do order, adjudge and decree that Joseph W. Nicholas is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered, adjudged and decreed that the United States have and recover of and from Joseph W. Nicholas the sum of Nine Dollars and ninety-eight cents ($9.98), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

XI. *Claimant's Application for and Allowance of an Appeal.*

Comes now the claimant and makes application for an appeal to the Supreme Court of the United States.

SPOOR & RUSSELL,
Attys. of Record.

DUDLEY & MICHENER,
Counsel.

Filed April 5, 1920.

Ordered: That the above appeal be allowed as prayed for.

April 5, 1920.

BY THE COURT.

Court of Claims.

No. 33263.

JOSEPH W. NICHOLAS

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court by Hay, J., of the judgment of the court; of the application of the claimant for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 6" day of April, A. D. 1920.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

[Endorsed:] File No. 26,650. Supreme Court U. S., October Term, 1919. Term No. 168. Joseph W. Nicholas, Appellant, vs. The United States. Transcript of record returned pursuant to order on motion to remand for additional findings. Filed April 7, 1920.

Office Supreme Court, U. S.
FILED
OCT 27 1920
JAMES D. MAHER,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

JOSEPH W. NICHOLAS,

Appellant,

vs.

THE UNITED STATES.

No. 47[redacted]10

APPELLANT'S BRIEF.

WILLIAM E. RUSSELL,
L. T. MICHENER,
Attorneys for Appellant.

P. G. MICHENER,
Of Counsel.

THE REPORTER CO., WALTON, N. Y.
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1920

Supreme Court of the United States

OCTOBER TERM, 1920.

JOSEPH W. NICHOLAS, Appellant. vs. THE UNITED STATES.	No. 47.

APPELLANT'S BRIEF.

Statement of the Case.

I.

The above case comes to this court on appeal from a judgment of dismissal entered in the Court of Claims. It is a companion case to the Norris case, number 48 on the calendar of this court, and the facts in the two cases are somewhat similar. As the law points applicable to this case have been fully discussed in the brief filed in the Norris case, counsel refers the Court to that case for points.

II.

Both Nicholas, the appellant above, and Norris were inspectors of customs in the port of Baltimore. Both were summarily, arbitrarily and unlawfully removed without charges on February 20th, 1913. Both were receiving $4.00 per diem at the time of their

removal. Norris was subsequently reinstated and again removed, but Nicholas, the claimant here, failed to secure restoration to his office at any time.

Nicholas was summarily ejected from office on February 20th, 1913, by the Collector of Customs pursuant to a letter from the Secretary of the Treasury (New Findings II). At that time he was in the classified civil service of the United States (New Findings II). It appears that on August 24th, 1911, a committee of special agents appointed by the Secretary of the Treasury to investigate the port of Baltimore made a report upon the conduct of the customs business at the said port. This report was filed with the Secretary of the Treasury and no action was taken thereupon in so far as same related to Nicholas, until February 20th, 1913. On that day Nicholas was summarily removed without charges and without being afforded an opportunity of defending himself (New Findings II). Nicholas had been appointed as an inspector of customs in the said port of Baltimore on January 28th, 1902, and had served continuously in such capacity at $4.00 per diem for a period of *eleven* years. He was never reinstated, and in this respect his case differs from the Norris case. He brought suit against the United States for the salary of his office accruing subsequent to his removal; his petition was filed May 23rd, 1916, three years after his removal (R. 1). His petition was dismissed in the court below and an appeal taken to this court.

III.

The Record Below.

Petition was filed in the court below May 23rd, 1916 (R. 1). By leave of court an amended petition was filed on October 17th, 1917 (R. 3). General

traverse was thereafter duly entered and filed (R. 4). The case was argued and submitted on March 6th, 1918. Findings of fact, conclusion of law and opinion of the Court were entered and filed May 13th, 1918 (R. 4). Petition was dismissed on the same date (R. 5 and 6), the traverse being sustained. Motion for new trial to remand the case to the general docket for the taking of testimony made June 11th, 1918 (R. 6). Motion for new trial was overruled by the Court below June 17th, 1918 (R. 6). Application for appeal was made and allowed July 16th, 1918 (R. 6). Motion to remand was made in the Supreme Court October 6th, 1919. Motion to remand granted by the Supreme Court and the lower court directed to set aside its judgment October 13th, 1919. New Findings of fact, conclusions of law and opinion in the court below March 8, 1920 (New Findings). Petition again dismissed on the same date. New record certified to this court at once.

ASSIGNMENT OF ERRORS.

The Court below erred:

First: In dismissing the petition.

Second: In not rendering judgment for the petitioner for the sum of $6,732.00 and for such additional amount as was due at the date of rendering judgment.

BRIEF OF ARGUMENT.

I.

This case is submitted upon the rules of law argued in the Norris case, No. 48, present term of this court.

It became necessary in this court to move for a remand of the record to the court below. The re-

mand having been granted and the judgment of the Court below having been set aside, proceedings were had below as though the case had never been tried. In the New Finding II it appears "that Nicholas was appointed to the customs service as an inspector in 1899; that he had been suspended for drinking; that he was rated number two by the surveyor and that he was charged with being at times indifferent, and again, as excellent." These charges were contained in the report of August 24th, 1911, and were buried for seventeen months, during which time the record is barren of any criticism of the plaintiff's conduct. The charges secretly made against this officer were most serious ones and assuredly he should have been afforded the opportunity of refuting them. Certainly the department, having waited seventeen months before acting upon the report, was in duty bound to apprise this claimant of the nature of these serious charges.

The Court below finds (New Finding II) that the plaintiff made no appeal to the Secretary of the Treasury for a restoration.

The Court finds (New Finding V) that the plaintiff was willing and physically able to assume the duties of his office and capable of discharging same, but that he did not apply for reinstatement or notify the proper department of his desire therefor or for revocation of the order of dismissal. The Court below finds that claimant's request for a finding that he did apply to the Collector of Customs and to the Chief Inspector of Customs for reinstatement and for the nature of the charges against him, to be not sustained by the evidence (New Findings V).

We submit that this claimant was unlawfully removed, and as there is no evidence in the record nor a finding to show that his position has ever been filled by another appointee, nor that the salary of his office has ever been paid to anyone else, he is entitled

to judgment. It is true that in New Finding III the Court below finds that there were only thirty-three positions of inspectors of customs in the District of Maryland authorized by law and that these positions are now filled and have been filled since 1913 by other persons. *There is nothing to show, however, that Nicholas' office was ever filled.* There was no evidence taken below, one way or the other, as to the thirty-three positions which the Court finds to be the fixed quota for the District of Maryland.

CONCLUSION.

Wherefore, it is submitted that the judgment of the Court below should be reversed and that judgment to the plaintiff be awarded for the full salary of his office accruing since the date of his unlawful removal.

Respectfully submitted,
WILLIAM E. RUSSELL,
L. T. MICHENER,
Attorneys for Appellant.

P. G. MICHENER,
Of Counsel.

FILED
FEB 7

No. [redacted]10

In the Supreme Court of the United States.

OCTOBER TERM, 1930.

JOSEPH W. NICHOLAS, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1931

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JOSEPH W. NICHOLAS, APPELLANT,
v.
THE UNITED STATES.
} No. 47.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment of the Court of Claims and is a companion case to that of *Wilson Scott Norris* v. *The United States*, No. 48, October Term, 1920. The facts presented, however, differ materially from that case. On motion of appellants, both cases were remanded for additional findings. In the present case the mandate of this court directed the Court of Claims "to set aside its judgment and reopen the case." Consequently it was tried *de novo* with the result that the court below found as facts two very material things, viz, that appellant never, after his removal, made an appeal to the Secretary of the Treasury to be reinstated and that the office occupied by appellant was filled

by another appointee on March 3, 1913, appellant having been removed on February 20, 1913, and that the office has since been held by another incumbent.

The findings of fact show that during the year 1911, the Secretary of the Treasury appointed a committee to investigate the conduct of the customs service and on August 24, of that year, the committee reported that appellant, while at some times an excellent officer, was at other times indifferent to his duties and had been suspended because of intoxication, and consequently the committee recommended his removal. The Secretary of the Treasury approved the recommendation and on February 19, 1913, directed the collector of customs at Baltimore to remove appellant "on account of the use of intoxicating liquors and the unsatisfactory and perfunctory manner in which he performs his work." On the next day, February 20, 1913, appellant was removed.

At the time of his removal, appellant was in the classified civil service, but no notice of any charges were given him nor was he afforded the opportunity to reply to the same. He was physically able and capable of resuming the duties of the office but never sought a revocation of his removal or applied for reinstatement.

CONTENTIONS.

Appellant rests his case on the proposition that he was removed contrary to the statute of August 24, 1912, and refers the Court to the argument in the *Norris* case to sustain his position that he is entitled to the salary of his office as an incident thereof.

The Government contends that its argument in the *Norris* case, No. 48, to which the Court is respectfully referred, bars recovery here. In addition the facts in this case show that,

1. Appellant abandoned his office.
2. That another person is and has been in possession of the office since appellant's removal.

ARGUMENT.

I.

TOTAL ABANDONMENT OR NONUSER OF AN OFFICE WORKS A FORFEITURE AND IS TANTAMOUNT TO A RESIGNATION.

Appellant was separated from his office on February 20, 1913, and from that date until the time he brought this suit on May 23, 1916, he took no active step to regain his office, either by requesting the Secretary to reinstate him, by protesting to the Secretary or by appealing to the courts. On the contrary he stood passively by, apparently acquiescing in his removal, and performing none of the duties or functions of his office. While the court below has found that he was physically able to perform the duties of his office, the findings do not disclose that he ever indicated his desire to have the order of removal revoked. Such facts lead only to the conclusion that appellant abandoned his office even were it to be held that he was not legally removed.

It has long been the law that neglect to perform the duties of a public office constitutes abandonment and consequently a forfeiture. Mechem says (Public Officers, Book II, sec. 435):

> Public offices are held upon the implied condition that the officer will diligently and faithfully execute the duties belonging to them, and while a temporary or accidental failure to perform them in a single instance or during a short period will not operate as an abandonment, yet if the officer refuses or neglects to exercise the functions of the office for so long a period as to reasonably warrant the presumption that he does not desire or intend to perform the duties of the office at all, he will be held to have abandoned it, not only when his refusal to perform was willful, but also where, while he intended to vacate the office, it was because he in good faith but mistakenly supposed he had no right to hold it.

It was so held in *People* v. *Hartwell*, 67 Calif. 11, where a duly elected officer failed to perform any of the duties of the office for a period of two years, owing to a mistaken notion that another had been elected to the office. In *Phillips* v. *Boston*, 150 Mass. 491, the court avoided the question of whether a police officer was illegally removed and held that nonuser over a considerable period of time was in itself an abandonment of the office. To the same effect are *Ide* v. *U. S.*, 25 C. Cls. 401–407; *Andrews* v. *Portland*, 79 Maine 484. In ex rel. *Arant* v. *Lane*,

249 U. S. 367, a delay of twenty months was considered a valid defense in an action in mandamus brought to recover possession of an office. Laches and abandonment being so closely related, this case is at least persuasive of the view this court would have taken had the defense of abandonment been interposed. (See also *Stone* v. *Board of Commissioners*, 164 Ky. 640.)

As a resignation by implication is practically the same as a forfeiture (Throop, Public Officers, sec. 407) and as such implication arises from facts clearly indicating an intent to abandon the office, it follows from the findings of the court below that appellant abandoned his office and forfeited whatever right he may have had to sue as a *de jure* officer for the emoluments of his office.

II.

Where the Office, from Which the De Jure Officer Is Excluded, Is Filled by a De Facto Officer, Who Performs the Duties and Receives the Emoluments of the Office, the De Jure Officer Can Not Recover the Salary of the Office During That Time.

The findings show that appellant was removed from his office on February 20, 1913, and that on March 3, 1913, the office formerly held by appellant was filled by a new appointment and has since been held by a person appointed by the Secretary of the Treasury, the appointing authority. Appellant attempts to attack this finding on the ground that

there was no evidence below to justify it, but this court has often said that it is not concerned with the testimony and evidence below but only with the ultimate facts as found. (*Burr* v. *The Des Moines Railroad and Navigation Co.*, 1 Wall. 99–102; *United States* v. *Smith*, 94 U. S. 214–218.) The findings could not be more conclusive than they are in this case. Appellant had been appointed an inspector of customs at the port of Baltimore and that was the position from which he was removed. The court finds that on March 3, 1913, there were only 33 positions of inspector of customs at Baltimore and that all of the offices were filled on and since March 3, 1913. The only possible deduction then is that either the office formerly occupied by appellant was filled or that it had been abolished.

While all of the authorities can not be reconciled as to whether or not a *de jure* officer can recover the salary of the office during the time it was paid to a *de facto* officer, yet the weight of authority favors the rule that there can be no recovery, and it is a general rule which is growing in favor.

In *Dolan* v. *Mayor* of New York, 68 N. Y. 274, 280, the Court said:

> It is clear that if the city could rightfully pay the salary of Keating during his actual encumbency, and has paid it, it can not be required to pay it again to the plaintiff. We are of opinion that payment to a *de facto* public officer of the salary of the office, made while he is in possession, is a good defense to

an action brought by the *de jure* officer to recover the same salary after he has acquired or regained possession.

In *Lee* v. *Wilmington*, 1 Marvel (Delaware) 65, and *Coughlin* v. *McElroy*, 74 Conn. 397, which are in accord with the above principle, the authorities are fully reviewed and discussed. The reviewer, in a note to the case of *Nall* v. *Coulter*, 4 Ann. Cas. 671 (117 Ky. 747), finds the weight of authority favoring the principle proposition. The Supreme Court of Illinois, by overruling its former decisions, is now in accord with the weight of authority. *People* v. *Burdett*, 283 Ill. 124; *People* v. *Schmidt*, 281 Ill. 211. See also:

Brown v. *Tama Co.*, 122 Iowa, 745.
Saline County Comm. v. *Anderson*, 20 Kans. 298.
Wayne County v. *Benoit*, 20 Mich. 176.
Parker v. *Dakota County*, 4 Minn. 59.
Hunter v. *Chandler*, 45 Mo. 452.
McDonald v. *Newark*, 58 N. J. L. 12.
Samuels v. *Harrington*, 43 Wash. 603.
State v. *Moores*, 70 Nebr. 48–57.

It is therefore clear that the Government is not liable to pay two salaries for a single service and that appellant has no right to the salary of the office until the *de facto* officer who holds the office is ousted by proper proceedings.

CONCLUSION.

We submit, therefore, that there can be no recovery in this case for the reasons that appellant abandoned the office and forfeited his right to the

salary; and that the emoluments of the office have been paid to the incumbent who performed the duties, whether *de facto* or not.

In addition, we submit, by reference to our brief in the *Norris* case, that since the only issue in a suit of this nature is the title to the office, the right of action is barred by laches; and, further, since the suit is admittedly not based on a contract, express or implied, but is based on an alleged unlawful removal, and since the Court of Claims is not invested with jurisdiction to issue prerogative writs nor with statutory jurisdiction to try the title to a public office, that court is without jurisdiction in the premises.

FRANK DAVIS, JR.,
Assistant Attorney General.

WILLIAM D. HARRIS, *Attorney.*

FEBRUARY, 1921.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

October Term, 1919.

JOSEPH W. NICHOLAS,
Appellant,

vs.

THE UNITED STATES.

No. [redacted]

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S MOTION FOR REMANDING OF RECORD.

BRIEF IN SUPPORT OF MOTION.

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

IN THE

Supreme Court of the United States

October Term, 1919.

JOSEPH W. NICHOLAS, Appellant, vs. THE UNITED STATES.	No. 168.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S MOTION FOR REMANDING OF RECORD.

BRIEF IN SUPPORT OF MOTION.

Now comes the appellant and moves the Court to remand the record in this case to the Court of Claims, with instructions to that Court to take evidence by deposition or otherwise, and to certify therefrom the facts bearing upon the following points:

> "I. Whether or not Joseph W. Nicholas stood ready, willing and able to perform the duties of his office as inspector of customs during all the times covered by this action."

Appellant shows to the Court that there was no contradictory or conflicting evidence in the Court of Claims on the above point.

Appellant further shows that this motion is governed by the action of this Court of June 2, 1919, in ordering a remand in the case of *Wilson Scott Norris* v. *The United States*, No. 565, October Term, 1918, which motion was in effect, both in law and in fact, similar to this motion to remand. The grounds of similarity are as follows: Both Wilson Scott Norris and Joseph W. Nicholas were inspectors of customs in the port of Baltimore, and both were removed summarily and without charges, in violation of law, on February 20, 1913. Both brought suit in the Court of Claims to recover the salary of their office, and both had their petitions dismissed in the court below on the ground that there was no evidence in the record to show that the claimants stood ready, willing and able to perform the duties of their office.

With reference to the absence of evidence showing that the claimant stood ready, willing and able to perform the duties of his office, appellant shows that the petition alleges in paragraph VII, thereof (R. 2):

> "During all the time from the date of claimant's removal on February 20, 1913, as heretofore alleged, claimant has stood ready, willing and able to perform the duties of the office to which he was legally appointed, and from which he was illegally separated. Claimant avers that he has been prevented from performing the duties of said office by direction of the Secretary of the Treasury, or his subordinates."

The petition was filed in the Court of Claims on May 23, 1916 (R. 1) and thereafter various departmental reports were filed constituting the evidence in the case. Under date of March 30, 1917, appellant, by his counsel, caused to be prepared a motion to be filed in the Court of Claims containing a stipulation in writing, which said motion was for the purpose of taking the testimony of the claimant in answer to certain written interrogatories, one of them reading as follows:

> "Since the 20th day of February, 1913, the date of your removal, have you or not, at all times stood ready, willing and able to perform the duties of the office of inspector of customs?"

The stipulation mentioned above, to which was annexed the interrogatories, was presented for approval to the attorney of the United States representing the defense in this case, for his approval and signature. The attorney for the United States read the stipulation and interrogatories and then and there stated that he would not agree to approve or sign even as to the question whether or not the claimant stood ready, willing and able to perform the duties of his office. The attorney for the Government gave as his reasons therefor that he did not wish to encumber the record. Counsel for claimant contended to the attorney for the Government that the Court might ask why claimant had not proven affirmatively his readiness, willingness and ability to perform the duties of his office. The Government's attorney replied that if the Court did that he would rise and say that there was sufficient proof in the record

and that the Government conceded as a fact, that claimant was ready, willing and able to perform the duties of the office. Relying upon this statement of the defense, appellant did not press the motion for the taking of testimony on this point.

This case, together with two other cases, involving the same law questions, were argued together before the Court of Claims on March 6, 1918. It was agreed between counsel on both sides and the Court that the argument of the law questions involved in the three cases should be made in one case, but with the understanding that the said argument should apply to the other two cases. On the 5th day of March, 1918, counsel for appellant called to the attention of the attorney for the Government that he had objected to claimant's request for Finding VII heretofore set forth. The objection in the brief of the Government to this finding was as follows:

> "Objected to because calling for a conclusion of law."

Counsel for appellant thereupon brought to the attention of the attorney for the Government the oral agreement heretofore mentioned as having been made on March 30th, 1917. The Government's attorney then stated that he regretted having made the objection, and in explanation thereof further stated that the conversation mentioned had passed out of his mind temporarily, but he then recalled it and said that on the argument the next day, in open court, he would express his regret to the Court and for the benefit of the record would concede that the claimant stood ready, willing and able to perform the duties of his office. When

this case was called for argument the following day the Government's attorney arose and informed the Court of the oral agreement of March 30, 1917, and then and there stated for the benefit of the record:

> "That the Government conceded that the claimant would have testified in answer to a written interrogatory that 'he was ready, willing and able at all times to perform the duties of his office.'"

This case was thereupon argued upon the various questions involved, the Court below making no comment on, or objection to this concession on the part of the Government.

Appellant's petition was dismissed for the reason, as it appears in Finding II (R. 5), that there was no evidence to show the willingness or the ability of appellant to perform the duties of his office.

Since his removal appellant has stood ready, willing and able at all times to perform the duties of his office and would have so testified in answer to the interrogatory heretofore mentioned and will so testify if given an opportunity by this Court.

Appellant further shows to the Court that on June 11, 1918, claimant filed a motion in the Court below for a new trial (R. 6) and for a remanding of the case to the General Docket for the taking of testimony. The Court below overruled this motion on June 17, 1918. In this motion for a new trial appellant caused to be submitted the affidavits of himself, of his counsel, Louis T. Michener, and of his attorney of record, William E. Russell. These affidavits set forth in detail the oral agreement made with the attorney for the Government with reference to the ques-

tion concerning appellant's readiness, willingness and ability to perform the duties of his office. The attorney for the United States filed a statement in reply to the aforesaid motion admitting herein that on the argument of the case he had made the concession heretofore set forth. Nevertheless, the motion was denied. Had the motion been allowed evidence would have been taken and it would have been proven that claimant stood ready, willing and able to perform the duties of his office.

JOSEPH W. NICHOLAS,
Appellant.

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

STATE OF CONNECTICUT, }
County of Hartford, } ss.:

Personally appeared before me, a notary public in and for the County of Hartford, Joseph W. Nicholas, who, being duly sworn according to law, deposes and says: That he is the appellant in the above-entitled case; that he has read the foregoing motion and understands its contents, and that the matters and things therein stated are true in substance and in fact; as he is informed and verily believes.

JOSEPH W. NICHOLAS.

Subscribed and sworn to before me }
this 15th day of September, 1919. }

F. S. ILLINGWORTH,
(Seal) Notary Public.

APPELLANT'S BRIEF ON MOTION TO REMAND RECORD.

Nature of Action.

This action is to recover the salary due Joseph W. Nicholas as inspector of customs in the port of Baltimore, at the rate of $4.00 per diem from February 20, 1913, to and including September 30, 1917. Appellant was appointed inspector on the 30th day of August, 1900. He continued under this appointment to the 20th day of February, 1913. On this latter date he was summarily and arbitrarily removed without charges and in violation of the rules of the Civil Service Commission, the Customs Laws and Regulations and the Act of Congress of August 24, 1912 (37 Stat. 555).

No charges were furnished appellant, nor was he allowed a reasonable time for personally answering same in writing (R. 4).

ARGUMENT.

I.

Appellant's removal on February 20, 1913, was an absolute nullity, being unlawful, invalid and of no force and effect because it was contrary to the Civil Service Rules, the Customs Laws and Regulations and the Acts of Congress. Civil Service Rule No. XII, Section 2, as amended by

executive order of February 8, 1912, was in effect at the time of this removal. We set forth in part the aforesaid rule:

> "A person in the competitive service whose removal is proposed, shall be furnished with a statement of reasons and be allowed a reasons and be allowed a reasonable time for personally answering such reasons in writing * * *"

This rule was promulgated in the Treasury Department by T. D. No. 32,265, on February 12, 1912.

The Customs Laws and Regulations of 1908 were also in effect on the aforesaid date. Article 1383 of said regulations provides in part, as follows:

> "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or with another appointing officer, of which the accused shall have full notice and an opportunity to make defense."

Article 1386 of the aforesaid regulations provides in part, as follows:

> "At the same time a complete copy of the charges and specifications will be furnished to the accused, with the information that such defense as is desired to be made in the premises must be submitted to the supervising officer for transmission to the Secretary of the Treasury within three days from date of receipt of the copy of the written charges."

There was also in effect at the time of his removal the Act of August 24, 1912, 37 Stat. 555, in part as follows:

> "Section 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service, and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing and affidavits in support thereof * * *"

There was no attempt made by the Treasury Department to comply with any of the foregoing requirements and appellant was arbitrarily, unlawfully and without notice removed form his office. *United States* v. *Wickersham*, 201 U. S., 390; *United States, ex rel. Newcomer* v. *Postmaster*, 221 Fed. 687.

II.

As appellant's removal was in violation of law he has never been lawfully removed and it follows that he is entitled to the salary of his office. The authorities are numerous and harmonious on this point.

Fitzsimmons v. *Brooklyn*, 102 N. Y. 536.
United States v. *Wickersham*, 201 U. S. 390.
Garvey v. *Lowell*, 199 Mass. 47.
Tucker v. *Boston*, 223 *ib.* 478.

Andrews v. *Portland*, 79 Me. 484.
Everill v. *Swan*, 20 Utah 56.
Houston v. *Estes*, 35 Tex. Civ. App. 99.
State ex rel. Dennison v. *St. Louis*, 90 Mo. 19.
Leonard v. *Terre Haute*, 93 N. E. 872.
Seifen v. *Racine*, 129 Wis. 343.
People v. *Stevenson*, 272 Ill. 215.

The foregoing cases agree that the salary of an office is an incident thereof and that the legal title to the office carries the right of salary with it.

The *Wickersham case*, *supra*, was similar to the instant case as it involved a removal without charges. This Court held that the removal was a nullity and that Wickersham was entitled to the salary of his office during the period of removal.

III.

We do not understand that the rule has ever been established that a public officer, who has been unlawfully removed must prove affirmatively that he was ready, willing and able to perform the duties of his office during the period of removal in order to recover the salary thereof. If the salary attaches to the office as an incident thereof, it would seem to follow that he who holds legal title thereto must be entitled to the salary. Therefore, readiness, willingness and ability are presumed, on the part of one who is an officer "*de jure*." There are many cases that hold that a claimant for the salary of an office, may still recover same even though he had other employment during the period of unlawful removal. In the *Fitzsimmons case*

(*supra*), the claimant had other employment and received another salary during the time he was ousted from his office, but he was awarded the salary of his office on the ground that "the salary attached thereto as an incident thereof." The same conditions existed and the same rule was followed in.

State ex rel. Chapman v. *Walbridge*, 153 Mo. 194.
Houston v. *Estes* (*supra*).
Everill v. *Swan* (*supra*).

IV.

If, however, it should be deemed necessary that appellant prove his willingness, readiness and ability to perform the duties of his office as a condition of recovery, it is respectfully submitted that the concession made by the attorney for the Government, as heretofore alleged, was competent evidence and sustained the averments of paragraph th of the petition heretofore set forth. Appellant vels that he has been aggrieved by the action of he Court below in dismissing the petition when ounsel for the Government made the concession set forth herein. Therefore, appellant submits this Court deems this point material, that this se should be remanded to the Court below with structions to take evidence on the point, and rtify the facts to this Court. We submit and te to the Court that there was no conflicting idence in the Court below, and that the findings incomplete and inconclusive. We submit that

these deficiencies in the findings can be remedied and justice done to both parties hereto by remanding the record to the Court below, with instructions to find and certify as requested by the motion.

V.

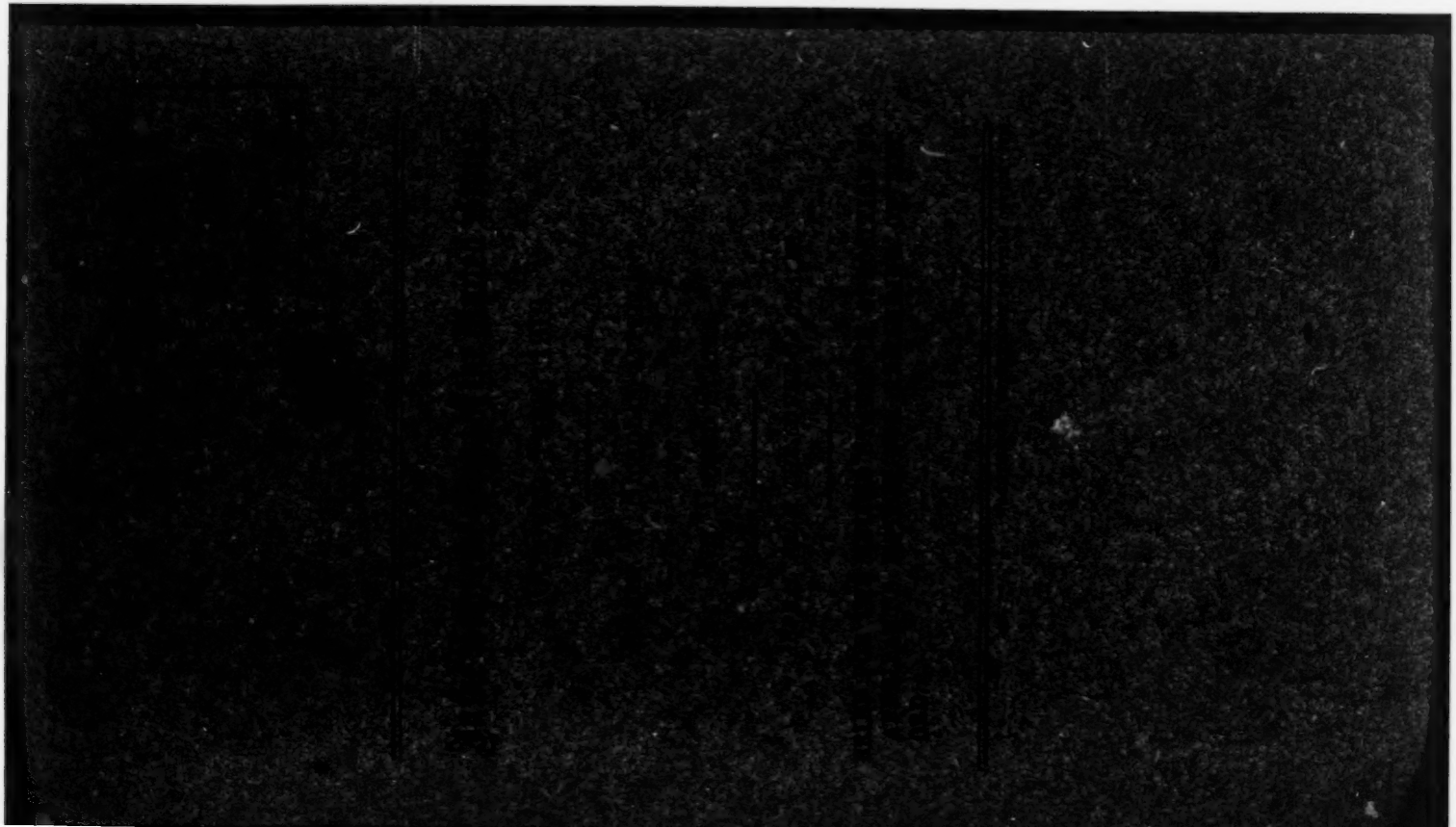
This motion is governed by the action of this Court of June 2, 1919, in ordering a remand in the case of Wilson Scott Norris v. *The United States, No. 565, October Term, 1918, which motion was in effect, both in law and in fact, similar to this motion to remand.*

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

CERTIFICATE.

We, as appellant's counsel, hereby certify that in our opinion this motion for a remanding of the record is well founded in law, is in the interest of justice, and is not interposed for the purposes of delay.

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.



In the Supreme Court of the United States.

OCTOBER TERM, 1919.

JOSEPH W. NICHOLAS, APPELLANT,
v.
THE UNITED STATES. } No. 168.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLANT'S MOTION FOR REMANDING OF RECORD.

STATEMENT.

Appellant was in the classified civil service of the United States on and prior to January 20, 1913, holding the position of inspector of customs at the port of Baltimore. On January 20, 1913, he was discharged from the service of the United States. On May 23, 1916, he filed his petition in the Court of Claims, claiming that his removal was invalid and asking judgment against the United States for $4,740, as compensation from February 20, 1913, to and including May 20, 1916. By an amendment to his petition the amount claimed was increased to $6,732 and included the period from February 20, 1913, to September 30, 1917. Evidence was taken in the case; it was tried by the Court of Claims on March 6,

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1918, and on May 13 judgment was entered against appellant. The record sets forth the findings of fact made by the Court of Claims upon the evidence introduced.

In paragraph VII of the petition in the Court of Claims (R., 2) claimant alleges:

> VII. During all the time from the date of claimant's removal on February 20, 1913, as heretofore alleged, claimant has stood ready, willing, and able to perform the duties of the office to which he was legally appointed and from which he was illegally separated. Claimant avers that he has been prevented from performing the duties of said office by direction of the Secretary of the Treasury or his subordinates.

The Court of Claims finds (Finding II, R., 5):

> There has been no evidence taken in this case to show either the willingness or the ability of the plaintiff to perform the duties of his office as inspector of customs from the date of his removal from the service on February 20, 1913. It does not appear that he made any report in person or in writing to the office of the collector of customs at Baltimore.
>
> The plaintiff is the sole owner of this claim, and no assignment or transfer of the claim, or any part thereof or interest therein, has been made.

Appellant's motion in this court is—

> to remand the record in this case to the Court of Claims, with instructions to that court *to*

take evidence by deposition or otherwise, and to certify therefrom the facts bearing upon the following points:

1. Whether or not Joseph W. Nicholas stood ready, willing, and able to perform the duties of his office as inspector of customs during all the times covered by this action.

This is the only finding of fact the court is requested to make—that is, whether or not appellant was ready, willing, and able to perform the duties of his office, as alleged in his petition. This court is asked to direct the Court of Claims to now take evidence upon which to base this requested finding, not to find it from the evidence before it.

ARGUMENT.

I.

It was incumbent upon appellant to introduce evidence to establish the affirmative allegation made in paragraph VII of his petition. The Court of Claims finds, definitely (R., 5): "There has been no evidence taken in this case to show either the willingness or the ability of plaintiff to perform the duties of his office * * *." This finding of the Court of Claims is conclusive. (*United States* v. *New York Indians*, 173 U. S. 464.) The fact that appellant now asks that the Court of Claims be required to take evidence upon this question upon which to base a finding shows that there is no evidence as to this in the record.

II.

What appellant is really asking is for a new trial. Applications for new trials in the Court of Claims are governed by rules 90 to 95 of that court. (A copy of these rules will be found in the appendix to this brief.)

Clearly the only reason for a new trial appellant could urge would be that set forth in his motion, namely, that he be given the opportunity to introduce evidence to support the allegations of paragraph VII of his petition. Upon no possible theory could this come under the head of newly discovered evidence, as defined by the said rules. Therefore the Court of Claims rightly overruled the motion made to it for a new trial.

III.

Appellant is incorrect in his statement that the attorney for the Government stated that "he would rise and say that there was sufficient proof in the record and that the Government conceded as a fact that claimant was ready, willing, and able to perform the duties of his office." Obviously, no such statement would or could be made as to a record which admittedly contained *no* evidence upon this matter.

Counsel for appellant has evidently confused this case with a similar case in which there was some evidence upon this point in the record. The attorney for the Government did admit that if the question set forth on page 3 of appellant's brief, namely:

> Since the 20th day of February, 1913, the date of your removal, have you or not, at all times stood ready, willing and able to per-

> form the duties of the office of inspector of customs?

had been asked appellant, the answer would have been in the affirmative. No agreement was made as to the *fact;* but only that the witness would answer "yes" to a given interrogatory. No agreement was made as to the sufficiency or competency of the answer to establish the fact or as to the relevancy, the question being Paragraph VII of appellant's petition propounded to appellant as an interrogatory. There was no refusal of any request to take evidence of any character appellant might have desired; appellant had the right to produce whatever evidence he considered proper or necessary, and this right could not be taken from him. Giving the stipulation set forth on page 5 of appellant's brief the greatest possible effect (and admittedly it embodies all of any stipulation that may have been made by counsel below), it is not evidence and could not be considered if certified to this court. (*Burr* v. *The Des Moines Railroad & Navigation Co.*, 1 Wall. 99.)

It was incumbent upon appellant to establish all the material allegations of his petition by some competent evidence. (*United States* v. *Ross*, 92 U. S. 281.) The Court of Claims is bound by law and the rules of this court to find facts from such evidence; it can not use statements of counsel for this purpose. It is evident that the Court of Claims did not consider that any sufficient evidence on that point was before it. No evidence of any acts of the plaintiff was attempted. There was no intention to mislead

counsel for appellant, and if the allegation could have been proved it is regretted that it was not.

IV.

Appellant claims that this motion is governed by the action of this court on the motion to remand in the case of *Norris* v. *United States*, No. 565, October term, 1918. We think not. It is true that the motion in that case was to remand the record to the Court of Claims "to take evidence by deposition or otherwise and to certify therefrom the facts bearing upon the following points."

This motion was not opposed by the Government. It appears from it that there was evidence in the record on the first two findings requested; and also that the third finding, which is identical with the sole finding requested in the motion now before the court, was claimed by the appellant in that case to be supported by evidence in the record, *additional* to the claimed stipulation of counsel, namely, letters to the Secretary of the Treasury. (Appellant's motion in *Norris* v. *United States*, No. 565, October term, 1918, p. 5.) There is admittedly no evidence of any kind in the present record.

The entry in the Norris case is as follows:

> On consideration of the motion of the appellant to remand this cause to the Court of Claims for further finding of facts,
>
> *It is now here ordered by the Court*, That said motion be, and the same is hereby, granted.
>
> JUNE 2, 1919.

We take it that the cause was remanded for further finding of facts from the record and not for a new trial, which would be the effect if the remand was to compel the Court of Claims to take evidence. As stated above, this motion was not opposed by the Government. There is no provision in law for the Court of Claims to take evidence. If it is considered that the parties should be allowed to introduce additional or different evidence, that privilege can only be afforded by a new trial. The motion was regarded by the Government as a motion to remand for further findings of fact under the established practice. (*Ripley* v. *United States*, 220 U. S. 491.)

We think it proper to advise the court that appellant in the Norris case has considered the entry sustaining his motion as authorizing the taking of further testimony, which he has accordingly done. His testimony has been filed in the Court of Claims, and that court is now asked to find facts from said evidence and certify the same to this court. It is submitted that a remand of a record to the Court of Claims for additional findings of fact requires such findings to be made from the evidence before the court, and does not authorize the taking of additional evidence. That additional evidence can only be taken when a new trial is granted and the trial court has the opportunity not only to find such facts as may be established by the new evidence, but to modify its judgment if the additional facts found so require.

Respectfully submitted.

FRANK DAVIS, JR.,
Assistant Attorney General.

APPENDIX.

RULES OF THE COURT OF CLAIMS RELATIVE TO NEW TRIAL.

90. Whenever it is desired to question the correctness or the sufficiency of the court's findings of fact or its conclusions or to amend the same, the complaining party shall file a motion, which shall be known and may be considered as a motion for a new trial. All grounds relied upon for any or all of said objects shall be included in one motion. After the court has announced its decision upon such motion, no other motion by the same party shall be filed unless by leave of court.

Motions for new trial, except as provided by section 1088 of the Revised Statutes (sec. 175 of the Judicial Code), shall be filed within 60 days from the time the judgment of the court is announced.

91. A motion for a new trial other than under Revised Statutes, section 1088, must be founded upon one or more of the following grounds: First, error of fact; second, error of law; and, third, newly discovered evidence.

92. A motion founded upon an error of fact must specify with minuteness the fact or facts which are regarded as erroneously found or erroneously omitted to be found by the court, with full reference to the evidence which is relied on to support the motion.

93. A motion founded upon error of law must specify with like minuteness the points upon which the court is supposed to have erred, with references to the authorities relied upon to support the motion.

94. A motion by the claimant upon the ground of newly discovered evidence will not be entertained unless it appear therein that the newly discovered evidence came to the knowledge of the claimant, his attorney of record, or counsel after the trial and before the motion was made; that it was not for want of due diligence that it did not sooner come to his knowledge; that it is so material that it would probably produce a different judgment if the new trial were granted; and that it is not cumulative.

Such motion must be accompanied by the affidavit of the claimant or his attorney of record, setting forth—

First. The facts in detail which the claimant expects to be able to prove, and whether the same are to be proved by witnesses or by documentary evidence.

Second. The name, occupation, and residence of each and every witness whom it is proposed to call to prove said facts.

Third. That the said facts were unknown to either the claimant or his attorney of record, and, if other counsel was employed at the trial, were unknown to such counsel until after the close of the trial.

Fourth. The reasons why the claimant, his attorney of record, or counsel could not have discovered said evidence before the trial by due diligence.

95. Motions for a new trial must also be accompanied by the brief of the moving party, a copy of which must be served upon the opposing party, who may file his brief in response thereto. The motion will be considered by the judges in conference upon such briefs and affidavits, if any, and will there be decided or sent to the law calendar for argument.

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NICHOLAS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 10. Argued October 5, 1921.—Decided November 7, 1921.

1. A person who has been removed from a place in the classified civil service, by the proper authority, but without charges or opportunity to answer, in violation of § 6 of the Act of August 24, 1912, c. 389, 37 Stat. 555, can not recover subsequent salary attached to the position if he has not been diligent in asserting his rights. P. 75. *United States* v. *Wickersham*, 201 U. S. 390, distinguished.
2. After summary removal, without charges, from the office of Inspector of Customs, claimant did nothing for his vindication for three years, when he sued for the salary since accrued. *Held*, that he had abandoned his title and could not recover. P. 76.

53 Ct. Clms. 463; 55 *id.* 188, affirmed.

APPEAL from a judgment of the Court of Claims in a suit to recover the emoluments of an office accruing after appellant's unlawful removal from it. See also *post*, 77, 82.

Mr. William E. Russell, with whom *Mr. L. T. Michener* and *Mr. P. G. Michener* were on the brief, for appellant.

Mr. Assistant Attorney General Riter, with whom *Mr. Assistant Attorney General Davis* and *Mr. William D. Harris* were on the brief, for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

Claimant brought suit in the Court of Claims to recover compensation as inspector of customs at the port of Baltimore from February 20, 1913, to May 20, 1916, in the sum of $4,740.00, being at the rate of $4.00 per day for the period covered. He alleged that he was summarily removed from the service of the United States without charges of any kind being preferred against him, and without an opportunity to be heard, in violation of § 6 of an Act of Congress approved August 24, 1912, c. 389, 37 Stat. 555. He afterwards amended his petition so as to claim $4.00 per day to the day of rendering judgment, September 30, 1917, being the sum of $6,732.00. The Court of Claims rendered judgment for the United States. 53 Ct. Clms. 463.

The Court of Claims made a finding of fact from which it appears that Nicholas was appointed an inspector of customs at the port of Baltimore on January 28, 1902, at a compensation of $4.00 per day; that he continued to discharge the duties of such inspectorship until February 20, 1913, when he was summarily discharged by the Collector of Customs at the port of Baltimore pursuant to instructions issued by the Secretary of the Treasury; that he was in the classified civil service of the United States; that charges had been preferred against him by a committee appointed by the Secretary of the Treasury to examine into and report the conduct of the customs business at Baltimore; that Nicholas had no notice of the charges, was not furnished with a copy thereof, nor was he allowed

a reasonable time to personally answer the same in writing. The court further found that there was no evidence of the willingness and ability of the claimant to perform the duties of the office of inspector of customs from the date of his removal on February 20, 1913; that it did not appear that he made any report in person, or writing, to the office of the Collector at Baltimore. As a conclusion of law the court found the claimant not entitled to recover.

An appeal was taken to this court from the judgment of the Court of Claims. Upon motion the Court of Claims was directed to set aside its judgment, reopen the case, and make additional findings of fact. In obedience to a mandate of this court the Court of Claims set aside its judgment, took additional proof, made new findings, and again concluded that the claimant was not entitled to a recovery. 55 Ct. Clms. 188. That judgment is here for review.

From the amended findings of fact it appears that Nicholas entered the customs service in 1899 as an inspector; that the committee, appointed by the Secretary of the Treasury to examine into and report the conduct of the customs service at Baltimore, made a report from which they concluded that owing to the conduct of Nicholas, and from personal observation, they were of the opinion that the service would be benefited by his removal therefrom. On February 5, 1913, the Secretary of the Treasury approved this recommendation, and instructed the Collector of Customs at Baltimore to remove the claimant on account of his use of intoxicating liquors, and the unsatisfactory and perfunctory manner in which he performed his work. On February 20, 1913, he was removed from the service. At the time of his dismissal he was in the classified civil service, and had no notice of any charges against him. On August 24, 1912, Congress passed an act authorizing the President to reorganize the

customs service (c. 355, 37 Stat. 434). This reorganization was reported to Congress March 3, 1913. Thirty-three inspectors of customs were provided for the District of Maryland, including the State of Maryland, the District of Columbia, and the City of Alexandria, Virginia, which offices were filled since March 3, 1913, by persons appointed by the Secretary of the Treasury; claimant made no appeal to the Secretary of the Treasury at the time of his removal from office; he was willing and physically able to resume the duties of the office, and capable of discharging the same, but did not apply for reinstatement at any time, nor notify the Secretary of the Treasury of his desire therefor, or for a revocation of the order for his dismissal.

It appears that the petition was filed in the Court of Claims more than three years after claimant had been removed from office. It alleged that, being able and willing to discharge the duties of the office, plaintiff was entitled to compensation because of his illegal removal by failure to comply with the provisions of the Act of August 24, 1912, 37 Stat. 555:

"Sec. 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and

copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same."

The purpose of this statute, as its terms plainly show, is to require that one in the classified civil service of the United States have an opportunity to know of the charges against him before removal with an opportunity to answer them and, if awarded a trial, to have one before the officer empowered to act in the matter. The question presented is whether the plaintiff may recover his salary when removed without compliance with the statute, where he delays taking any steps to test the legality of his removal, or asking for an opportunity to be heard, for the length of time herein shown.

We agree with the Court of Claims that a person illegally dismissed from office is not thereby exonerated from obligation to take steps for his own protection and may not for an unreasonable length of time acquiesce in the order of removal, which it was within the power of the Secretary to make, and then recover for the salary attached to the position. In cases of unreasonable delay he may be held to have abandoned title to the office and any right to recover its emoluments. The claimant relies upon the *Wickersham Case*, 201 U. S. 390. In that case this court held that one entitled to the protection of a rule, or statute, requiring notice to be given him could not legally be separated from the service by suspension without compliance with the rule or statute, and was entitled to compensation during the period of his wrongful suspension. In that case the record disclosed that Wickersham was suspended on November 1, 1897, and that on November 5, 1897, he protested against his suspension and on December 28, 1897, demanded his salary. The case did not present and there was no occasion to decide the question of the effect of delay and acquiescence upon the right to recover compensation. It appeared that Wickersham

was diligent in asserting his rights as well as ready and willing to discharge the duties of the Government employment in which he was engaged.

It must be remembered that we are dealing with the discharge of public duties which it is important shall be carried on regardless of the personnel of those who discharge them. While one inducted into office or public employment is entitled to the privileges or emoluments thereof, until legally separated therefrom, he is not absolved from the duty of diligence upon his part in the assertion of his right to the office, or to the compensation attached thereto. Public policy requires that the Government shall be seasonably advised of the attitude of its officers and employees attempted to be displaced when they assert illegal removal or suspension as a basis for the recovery of the office or its emoluments. This is necessary in order that proper action may be taken in the public interest, as well as that which is required to vindicate the rights of one wrongfully removed from the public service. This principle was recognized in *United States ex rel. Arant* v. *Lane*, 249 U. S. 367. That case was one in mandamus to compel the restoration of an officer, who alleged that he was wrongfully removed without notice or an opportunity to be heard, and it was held that a delay of twenty months barred by laches his right to the writ. The reasoning of the opinion, and the comments as to the character of public employment and the conduct required of one who would assert his rights when wrongfully deprived of them, are apposite here. The findings in this case disclose that plaintiff took no steps to question the order dismissing him from the service, nor to ask for a copy of the charges upon which he was removed. He did nothing for his vindication until he brought this suit three years after his removal from the office, to recover compensation. We hold, therefore, as did the Court of Claims, that such a lack of diligence evidenced an

71. Counsel for Appellant.

abandonment of his title to the office, and of his right to recover the emoluments thereof.

Affirmed.